



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 593 (N) of 2009**  
**KENYA PLANTATION & AGRICULTURE**

**WORKERS UNION .....CLAIMANT**

**-VERSUS-**

**COFFEE RESEARCH FOUNDATION .....RESPONDENT**

**Mr. Issa Wafula for the Claimant union.**

**Mr. Muthoga for the Respondent.**

**JUDGMENT**

The Claimant union has filed this suit on behalf of ten (10) grievants who were employed on diverse dates and by the Respondent in the position of security guards.

The grievants are:

1. Heman Oyinda.
2. Joseph Warindi.
3. George Bilembo.
4. Dismas Ochoro.
5. Euphain Savala.
6. Kennedy Wekesa.
7. Peter Ochieng.
8. Stephen Kaego.
9. Paul Muturi.
  
10. Simon Njeru.

In terms of the Memorandum of claim filed on 12<sup>th</sup> October, 2009, the Claimant had a valid recognition Agreement and Collective Bargaining Agreement (CBA) with the Respondent.

That the CBA covered all terms and conditions of service of all employees of the Respondent who were members of the Union and all unionisable employees who were yet to join the Union.

The CBA in dispute is for the period 1<sup>st</sup> July, 2007 to 31<sup>st</sup> June, 2009 which is attached to the

Memorandum of claim.

In terms of the CBA in place, the parties had agreed on a salary increment of 13% for the 1<sup>st</sup> year and a further 13% for the 2<sup>nd</sup> year.

It is alleged by the Claimant that the Respondent however implemented the CBA in a discriminatory manner in that it entered into less favourable contracts with the grievants who it regarded as seasonal contract employees.

The dispute was reported to the Minister of Labour under **Section 65 (i)** of the **Labour Relations Act, 2007** on 11<sup>th</sup> May, 2009. The dispute reported was;

- i. Non-implementation of CBA on seasonal contract employees.
- ii. Violation of clauses 31 4(a); 5(a) and (b); 9(a) and (b); 10 (a), (b) and (c) and 22 (1).

The dispute was not resolved.

The Claimant submits that the grievants were members of the Union but the Respondent had refused to implement a check-off system to remit union dues to the Union.

Meanwhile on 30<sup>th</sup> May, 2009, the grievants employment with the Respondent was terminated by the Respondent on 30<sup>th</sup> May, 2009.

**Mr. Joseph Ogeya Warienda** testified on behalf of the grievants and told the court that the ten (10) grievants were employed as security guards. He himself was employed on 16<sup>th</sup> September, 2003. That himself and 10 others had worked continuously for the Respondent until September, 2008 when the Respondent purported to employ them on three months written contracts for the period 1<sup>st</sup> September to 30<sup>th</sup> November, 2008.

The purported contracts were produced in court by the Respondent and are marked appendix 2 to 8 respectively.

These short term contracts were renewed but on 30<sup>th</sup> April, 2009, the Administrative Manager Mr. R.M. Muthanga directed that the contracts should not be renewed “*due to failure to perform their duties diligently*”. The letter referred to all the grievants herein except **Paul Muturi** and **Simon Njeru** and same is attached to the Memorandum of Response.

The Claimant submits that failure to implement the CBA with respect to the grievants was discriminatory and therefore unlawful as it violated **Section 5 (4)** of the Employment Act, 2007 and was contrary to ILO Convention No. 100 which prohibits discrimination at the work place.

hat the grievants had worked continuously for periods of more than five (5) years without being confirmed into permanent positions. Therefore, the purported short term contracts were a perpetuation of the discrimination and amounted to unfair labour practice.

That the grievants were covered under Clause 29 of the CBA which provides;

**“Seasonal Labour**

- a. **Seasonal workers are eligible for union membership and enjoy the terms and conditions as stated in this Agreement.”**

It is the Claimant’s case that the agreement signed on 30<sup>th</sup> June, 2008, was clearly applicable to the grievants and should be applied to the letter in arrears with respect to the grievants until the date of

termination which was 30<sup>th</sup> May, 2009.

### **Prayers.**

The Claimant prays the following;

1. *The Respondent be directed to implement the CBA to all the unionisable employees without discrimination.*
2. *The Respondents be ordered with respect to all unionisable employees and in particular the grievants, to tabulate and pay in arrears, underpayment of wages and any other benefits not implemented.*
3. *That the honourable court to nullify the purported contract letters issued to the security guards and compel the Respondent to pay redundancy benefits to the grievants as per the CBA.*

The claim is supported by the testimony of **Mr. Joseph Warindi**, the 2<sup>nd</sup> listed grievant and all the annexure produced in court regarding the history of the dispute especially the relevant CBA and the reports of the dispute resolution mechanism embarked on by the parties.

### **Response.**

The Respondent filed a Statement of Response on 30<sup>th</sup> March, 2010 in which it admits that the parties had a valid Recognition Agreement with the Claimant and had concluded several CBAs including the one covering the period 1<sup>st</sup> July, 2008 to 31<sup>st</sup> June, 2010.

Respondent further states that two different unions cover the employees and hence two CBAs are in place, one with the Claimant Kenya Plantation & Agricultural Workers Union (KPAWU) and another with Kenya Union of Commercial Food and Allied Workers (KUCFAW).

That the CBA with KUCFAW covers 134 unionisable staff out of the total 153 staff listed in the Memorandum of Response which list includes security staff. This CBA was signed on 30<sup>th</sup> June, 2008 and was effective from 1<sup>st</sup> July, 2007 for a period of two (2) years and/or until it is replaced.

The 2<sup>nd</sup> CBA covered permanent manual workers and seasonal workers. These workers are employed mainly during two (2) picking seasons in a year and are terminated once the job is over.

The Respondent submits further that casuals are not covered by either of the CBAs and are therefore remunerated strictly in terms of Regulation of Wages Order Gazette by the Government promulgated from time to time.

These casuals are employed on three (3) months contracts attached to this memorandum. A few are however employed on daily rates.

It is the Respondent's case that the ten (10) grievants were not members of the union but were casuals employed on daily basis as security guards.

Respondent cites Clause 29 (b) of the CBA which reads;

*“Casual workers employed by the Foundation are outside the scope of the Agreement but their terms shall be in accordance with the Kenya Coffee Growers and Employers Association and Kenya Plantation and Agricultural Workers Union shall apply.”*

That they were employed on daily rates and the redundancy clause did not apply.

That in August, 2008, their employment was updated to three (3) months contract which included payment of benefits like notice leave and NSSF. The 10 grievants were in this category as per the annexure to the Memorandum of Response.

Respondent insists that since they were not union members, they were not entitled to the CBA salary increments nor to other terms of the CBA including the redundancy clause. Thus they were not entitled to any further benefits upon termination. Respondent therefore admits that the 10 grievants were not paid in terms of the CBA nor were they given terminal benefits under the redundancy clause.

The Respondent denies ever receiving the check-off forms in respect of the 10 grievants and states in any event, since they were casuals, they were not unionisable.

The Respondent called **Mr. Festus Ouma Bolo**, a Senior Administrative Officer with the Respondent who confirmed all the averments by the Respondent in his testimony and urged the court to dismiss the entire claim as the grievants were neither unionisable, nor were they entitled to the claims they sought. That their terms were contained in the three (3) months contracts which were simply not renewed and were not entitled to any retrenchment benefits nor to any other terms contained in the CBA.

He told the court that all the employees of the Respondent have since been taken over by KCWAWU and the last CBA with the Claimant was the one that covered the period 1<sup>st</sup> of July, 2007 to 31<sup>st</sup> June, 2009. That the Claimant CBA'S only covered permanent manual workers and seasonal workers who worked in the field as pickers and that security staff were covered under the commercial union CBA and that casuals were paid as per the Agricultural Workers Wages order.

The witness denied that the grievants did any overtime and insists that they worked six (6) hours for five (5) days with two (2) rest days per week. That they got five (5) days off in three months and were not entitled to severance pay since KPAWU CBA did not cover them per clause 22.

### **Conclusion of Facts and Law.**

A CBA was concluded between the Claimant and the Respondent for the period 1<sup>st</sup> July, 2007 upto 31<sup>st</sup> June, 2009. The CBA contained 13% wage increment for each year. At the time the grievants worked as security guards for the Respondent without any written contract.

The evidence by the Claimant that the grievants had served continuously for periods exceeding five (5) years has not been rebutted by any credible evidence by the Respondent.

It is apparent that the Respondent purported to place them on three (3) months contract with effect from 1<sup>st</sup> September, 2008 in response to their demand to benefit from the terms of the CBA.

It is also apparent that the grievants were members of the Claimant union but the Respondent had refused to recognize their status and had refused to implement check-off forms submitted to it by the union so as to remit union dues on behalf of the grievants.

The Respondent then used the newly implemented short term contracts to terminate the services of the grievants without paying them any of the CBA benefits including termination benefits under the retrenchment clause.

The court is convinced beyond doubt that the grievants having served for such long periods with the Respondent were entitled to be paid the benefits that accrued to all unionisable employees under the said CBA from the period 1<sup>st</sup> July, 2007 to 31<sup>st</sup> June, 2009.

The conduct of the Respondent was clearly in violation of **Section 5 (3)** which states;

**“No employer shall discriminate directly or indirectly against an employee or prospective employee**

**or harass an employee or prospective employee-**

- b. In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment**

and

5 (4) which reads;

**“An employer shall pay his employees equal remuneration for work of equal value.”**

The court notes that under no circumstances should a person employed as a security guard to work continuously between 6 a.m. in the evening and 6 a.m. in the morning as was the case with the grievants for continuous periods or number of working days which amount in aggregate to the equivalent of not less than one month or performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more be regarded as a casual employee. See **Section 37 (1) (a) and (b)** of the Employment Act.

Furthermore, such an employee who was initially employed as a casual and who works continuously for two months or more, from the date of employment as a casual employee shall be entitled to such terms and conditions of service as is entitled to under this Act had he not initially been employed as a casual employee. See **Section 37 (3)** of the Employment Act.

The import of the above exegesis is that the Respondent was by failing to treat the grievants equally with other permanent employees and thereby failing to implement the terms of the CBA for the period 1<sup>st</sup> July, 2007 to 31<sup>st</sup> June, 2009 with respect to the grievants in violation of the stated provision of the Employment Act and the ILO Convention No. 100. In addition the Respondent was in violation of the CBA itself.

Accordingly, the Respondent is directed to;

- a. Implement the CBA concluded between the Claimant and the Respondent for the period 1<sup>st</sup> July, 2007 to 31<sup>st</sup> June, 2009 with respect to the 10 grievants herein;
- b. Tabulate and pay in arrears underpayment of wages and any other benefits not implemented with respect to the 10 grievants;
- c. Pay redundancy benefits to the 10 grievants in terms of the relevant clause of the CBA; and
- d. File and serve the Claimant with the computation in (a), (b) and (c) above within thirty (30) days from date of this judgment for consideration and approval by the court; and further
- e. To pay costs of the suit to the Claimant.

***Dated and delivered at Nairobi this 28<sup>th</sup> day of January, 2014.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**